



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005162

First-tier Tribunal No: HU/60379/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

4th March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

TEJ BAHADUR TAMANG
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Jaisri, Counsel, instructed by Sam Solicitors
For the Respondent: Mr Parvar, senior presenting officer

Heard at Field House on 15 February 2024

DECISION AND REASONS

1. The Appellant is a Nepalese national born on 23 November 1972 who appealed the Respondent's decision dated 1 December 2022 to refuse his application for entry clearance made as the adult child of his father and sponsor who was a Gurkha soldier.
2. First-tier Tribunal Judge Chana ("the Judge") dismissed the appeal in a decision dated 2 August 2023.
3. Permission to appeal was granted by Judge Sheridan in a decision dated 8 January 2024 in which it was decided that the decision was arguably procedurally unfair because of the significance of the sponsor's evidence to the Judge's evaluation of whether the sponsor and Appellant have a family life under Article 8 and, in particular, the adverse credibility findings made by the Judge in relation to the sponsor.

4. I gave the parties my decision at the hearing that there was a material error of law and this sets out that decision more fully.

The FTT Decision

5. An application was made at the hearing before Judge Chana for an adjournment on the grounds that the 79 year old sponsor was unwell following a cataract operation 4 days before. An undertaking to provide medical evidence as soon as the sponsor felt able to travel to his GP was offered, but declined by the Judge. The Judge then proceeded to hear the case in the absence of the sponsor. In her decision the Judge made various findings which rejected the sponsor's evidence in his Witness Statement and concluded with an adverse credibility finding in relation to both the sponsor and the Appellant.

The Appellant's grounds of appeal

6. In summary, the Appellant says:
 - a. the Judge failed to apply the correct test as set out in the case of Rai v ECO [2017] EWCA Civ 30 when assessing the existence of family life for the purposes of Article 8; and
 - b. the failure to grant the application for the adjournment was procedurally unfair and engages the principles of Nwaigwe (adjournment: fairness) [2014] UKUT 00418.
7. At the hearing Mr Jaisri submitted that it was a particularly unfair to have proceeded in the absence of the sponsor and then make adverse credibility findings in relation to him without giving him the opportunity to address the alleged factors underpinning those findings.

The Respondent's response

8. There is no Rule 24 response. However, Mr Parvar submitted that given the lack of medical evidence the Judge had not acted unfairly. The interests of both sides needed to be addressed.

My decision

9. The overriding objective set out in the First-tier Tribunal Procedure Rules to act in the interests of justice and fairness is the foundation for all procedural decisions. In many cases procedural rigour needs to be applied in order to reflect that principle and its application to both parties. However, procedural rigour cannot supplant the key principle of fairness and in particular, in a case such as this, whether deprivation of the affected party's right to a fair hearing will result. As Nwaigwe emphasised, the sole test is whether the decision was unfair.
10. In a case such as this, the sponsor had every interest in attending the hearing in order to seek to secure the ability of his son, the Appellant, to join him in the UK. There is no history of previous non-attendance or non-compliance.
11. There had been a previous decision in an appeal of one of the Appellant's siblings to which the principles of Devaseelan applied. Those principles clearly enabled the Judge to take relevant factual findings as her starting point in the Appellant's

case. Without further evidence addressing those matters it may well have been entirely appropriate to proceed in the absence of the sponsor as the appeal would have been bound to fail.

12. Instead though, there was evidence in the sponsor's Witness Statement combined with supporting exhibits specifically addressing the findings which had previously been made. The most important of those findings was that the Appellant was married and leading an independent life. The Judge refers to that finding and concludes that it undermines the credibility of the Appellant's claim, without addressing the sponsor's evidence in his Witness Statement, or the marriage status certificate provided in support. Further evidence about a change of address provided by the sponsor in his Witness Statement is also rejected on the basis that it is not corroborated. Finally, the adverse credibility findings are made in relation to not only the Appellant but also the sponsor.
13. It is a long-standing principle derived from the foundation of fairness that if a witness' credibility is to be challenged, the contradictory evidence must be put to the witness in order to provide an opportunity for them to respond and explain (Browne v Dunn (1893) 6 R.67 (HL)).
14. It was procedurally unfair therefore to refuse the application for an adjournment in the circumstances of this case and then to make the adverse credibility findings in the sponsor's absence.
15. As a result of these conclusions I must set aside the decision made by the Judge. I have regard to the principles set out in Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC) in determining whether the appeal should be remitted or retained in the Upper Tribunal. Given that the Judge's conclusions about credibility permeate the findings of fact, I conclude that a hearing de novo is required and the appeal should be remitted to the First-tier Tribunal.
16. However, the Appellant should be aware that this does not necessarily mean that another Judge will allow his appeal.
17. Given the nature of the error of law conclusion, I have not addressed the other ground of appeal any further.

Notice of Decision

18. The decision of Judge Chana is set aside. No findings are preserved.
19. The appeal is remitted to be reheard in the First-tier Tribunal but Judge Chana is excluded.

Tracey Bowler
Judge of the Upper Tribunal
Immigration and Asylum Chamber

17/02/2024